

Mailing Date: OCT 07 2009

[Appeal](#)

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR THE PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-0552
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-388670
v.	:	
	:	LID - 60393
461 NORTH LLC	:	
T/A BUCKHEAD SALOON	:	
457-461 N 3 rd ST	:	
PHILADELPHIA PA 19123	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-EHF-900	:	

JUDGE SHENKLE

BLCE COUNSEL: James E. Dailey, Esq.

LICENSEE COUNSEL: Edward B. McHugh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on March 17, 2009. The citation alleges that Licensee violated §437 of the Liquor Code, 47 P.S. §4-437, and §5.41 of the Liquor Control Board Regulations, 40 Pa. Code §5.41, on February 5, 2009, by operating the licensed premises without a valid health permit or license.

A hearing was held on June 30, 2009, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation, and to a summary of facts; however, Licensee did not agree that it was liable, for reasons discussed below.

FINDINGS OF FACT:

1. On May 2, 2008, the Department of Licenses and Inspections of the City of Philadelphia (L & I) issued a Food Preparation License (50+ seats) to Philadelphia 1301, LLC, for the licensed premises at 457-461 North 3rd Street. On its face, the permit was to expire the last day of April, 2009.

2. On December 16, 2008, the PLCB's Director of Regulatory Affairs notified Licensee that its application for a person-to-person transfer of this license from Philadelphia 1301, LLC, to 461 North, LLC, had been approved.

3. This investigation resulted from a complaint alleging operation without a health permit. On February 4, 2009, a liquor enforcement officer learned from L & I that Licensee did not have a current food preparing/serving license for the premises in its own name.

4. The officer visited the premises on February 5, 2009, and found two bartenders attending five patrons. The officer purchased beer. Other officers entered and conducted a routine inspection. No current and valid health permit for the premises in Licensee's own name could be found.

5. Licensee now has a Food Preparation License in its own name, valid until the last day of April, 2010.

DISCUSSION:

The parties agreed to the facts, but argued for different results.

Licensee cited *PSP, BLCE v. Soneez Place, Inc., t/a Soneez*, Citation No. 94-0979, 21 Sel. Op. ALJ 166 (1995), in which Administrative Law Judge Felix Thau dismissed the citation. The Bureau appealed the dismissal to the PLCB, which affirmed Judge Thau's decision.

The Bureau cited the adjudication of Citation No. 06-0624, *L.F.C., Incorporated*. In that case Judge Thau dismissed the citation and the Bureau appealed. The Board reversed. Licensee appealed the penalty on remand to the Court of Common Pleas, but later withdrew the appeal.

The Board's opinion in *Soneez Place* states that the Bureau's enforcement officer inspected the premises on April 13, 1994, and found that it met all requirements except that the health certificate listed the former licensee as the holder of the permit, rather than the current licensee. The premises was open and operating on that date. A person-to-person transfer had been approved on July 15, 1993. The Board investigator assigned to the transfer application reviewed the health permit in the transferor's name and raised no objection.

After the transfer was approved, the opinion notes that the new licensee "operated for several months" until the Bureau conducted its inspection. (Actually, the period was about nine months). The health license stated that it was not transferable; its expiration date was May 31, 1994, which was still in the future at the time of the inspection.

The Board noted that the ALJ's dismissal was based on the Bureau's failure to prove its case because the regulation did not give any notice or guidance concerning the time within which new licensees are required to obtain a health license in their own name.

The Board reviewed the provisions of 47 P.S. §4-437 and 40 Pa. Code §5.41 and observed that "There is no requirement, under the Liquor Code or the Board's regulations cited by the

Bureau, that the health license must be in the current licensee's name before it can operate as a restaurant and serve alcoholic beverages." This was Judge Thau's reasoning, and the Board found that there was substantial evidence to support his decision.

The investigation which resulted in the citation issued in *L.F.C.* began with a complaint from the Philadelphia Department of Licenses and Inspections to the Bureau alleging that the licensee was operating, although its food preparation permit had been revoked.

Officers visited the premises on December 28, 2005, and found it to be open and operating. They purchased beer and saw that the health permit on display appeared valid. L & I later attested that there was no valid preparing/serving food license on that date. A copy of a letter from L & I to the licensee dated November 21, 2005, stated that the food preparing/serving licenses "are revoked for failure to file and/or pay delinquent City Business Taxes."

Licensee contended that it was not aware of the revocation. Judge Thau's dismissal was based on his finding that the Bureau failed to establish the fundamental principles of due process associated with L & I's revocation; specifically, because the Bureau could not prove that the notice of revocation had been, in fact, mailed to the licensee. The Board held that there is no requirement in law for the Bureau to prove, as an element of the offense in a citation case, that the licensee had been given due process in the underlying revocation action.

In both of these cases an argument can be made, based on the operation of the relevant statute and regulation, that the licensee operating the premises on the dates of inspection was not in possession of a valid health permit. In *Soneez* the permit on its face noted that it was nontransferable, so the fact that another entity was licensed to operate the business at that address necessarily meant that the apparently valid permit was actually invalid.

In *L.F.C.* the permit appeared valid and listed the proper name, but in actual fact the health licensing authority had revoked it prior to the date of inspection.

In my opinion the apparently conflicting result in these two cases can be harmonized, and the rule which can be inferred from the opinions is this: facially valid health permits issued in the name of a predecessor in interest are sufficient to meet the requirement of a valid health permit unless, in fact, such permit has been revoked by the issuing authority.

In the present case the time lapse between the date the transfer was approved and the date of the Bureau's inspection was 50 days. In *Soneez Place* the same time lapse was 272 days. If the transferee-licensee in *Soneez Place* cannot be faulted for a delay of that length in changing the name on the health permit, Licensee in the present case is entitled to the same result, given a delay that was less than one-fifth as long.

This is not the conclusion I would have reached, left to my own devices. In my view, the requirement that a licensee "meet all the sanitary requirements ... in the municipality where the place to be licensed is operated, as provided by statute, ordinance or regulation ..." (40 Pa. Code §5.41, emphasis supplied) incorporates all of the municipality's requirements by reference, even if they relate to matters other than the actual healthfulness of the licensed premises.

The words I have underlined above reinforce in my mind the idea that all of a municipality's requirements for a health permit must be respected and enforced. Thus, if the municipality uses the L & I power as a hammer to collect its business taxes, that requirement is incorporated by reference in the PLCB regulation.

Notwithstanding this view, I am bound to apply the law as it stands. In an opinion mailed in 1995 which it has not disavowed, the Board stated its view that the absence in the regulations of a time limitation for a new licensee in a person-to-person transfer to obtain a health permit in its own name was fatal to a citation for operating without a current health permit.

The regulation still provides no time limit, and the decision in *L.F.C., Incorporated* did not overrule the holding of *Soneez Place*. Therefore, the citation must be dismissed.

CONCLUSIONS OF LAW:

The citation must be dismissed because of the controlling legal authority of the decision of the Pennsylvania Liquor Control Board dated June 8, 1995, in Citation No. 94-0979, *PSP, BLCE v. Soneez Place, Inc., t/a Soneez*.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 09-0552 is DISMISSED.

Dated this 30TH day of September, 2009.



David L. Shenle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.